Bell Atlantic
1300 I Street NW, Suite 400W
Washington, DC 20005

Kenneth Rust
Director, Federal Regulatory Affairs

EX PARTE OR LATE FILED

June 29, 1999

RECEIVED

JUN 29 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ex Parte

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket Nos. 94-1, 96-262, and RM 9210

Dear Ms. Salas:

Pursuant to Part 1.1206(b)(4) of the Commission's rules, Bell Atlantic requests that the enclosed material be made a part of the record in the items captioned above. Although filed originally in another proceeding, the data presented in the enclosures lend support to the positions espoused by Bell Atlantic in regard to its petition for forbearance.

Any questions on this filing should be directed to me at the address shown above.

Sincerely,

Ken. Rust

Enclosures

cc: Ms. T. Preiss

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

REPLY COMMENTS OF BELL ATLANTIC

Michael E. Glover
Of Counsel

James G. Pachulski
1320 North Court House Road
8th Floor
Arlington, VA 22201
(703) 974-2804

Attorney for the Bell Atlantic
telephone companies

June 10, 1999

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	

REPLY COMMENTS OF BELL ATLANTIC[1].

I. Introduction and Summary.

The Supreme Court required the Commission to consider the availability of elements outside the incumbent's network in deciding the incumbent carriers' unbundling obligations. Bell Atlantic and other parties provided extensive evidence that competing carriers have widely deployed their own network elements throughout the country and are obtaining those elements from alternative sources. Even though this evidence shows that competitors could deploy certain of their own network elements anywhere in the country, Bell Atlantic took a more moderate position. Bell Atlantic asked the Commission not to require unbundling of network elements only in those areas and for those customers where competitors *already* have deployed their own facilities or obtained them from alternative sources and are using them to serve local customers.

---

[1] The Bell Atlantic companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

AT&T and MCI WorldCom, on the other hand, take the most extreme position on unbundling. They argue that the Commission should ignore the extensive evidence of network elements that competitors have already deployed and require that every conceivable network element be unbundled anywhere, in any combination and for all time, simply because they want them. Without any factual support, they are trying to bring the Commission back full circle to requiring "that whatever requested element can be provided must be provided." But that is exactly what the Supreme Court told the Commission it cannot do.

Moreover, requiring incumbents to unbundle all of the network elements that AT&T and MCI WorldCom want would severely damage competition. Making network elements available at the Commission's TELRIC prices in areas where competitors have already deployed their own elements will be a "discouragement to facilities-based entry by CLECs and investment by ILECs as well." Kahn Reply Declaration at ¶ 3. Competitors have also documented the competitive damage that can be done through excessive unbundling: "[a] regulatory regime that fosters the broad availability of incrementally priced UNEs discourages competing carriers from building their own networks and leaves them dependent over the long term on the ILECs, to the detriment of the public interest." Cox Comments at 3. This confirms, as Justice Breyer pointed out, that "[r]ules that force firms to share every resource or element of a business would create, not competition, but pervasive regulation." *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721, 754 (1999)(J. Breyer, concurring) ("*Iowa Utils. Bd.*"). The Commission must therefore consider the extensive evidence that competitors have obtained their own

network elements from alternative sources and limit the incumbents' unbundling obligations accordingly.

Finally, the Commission should not attempt to create new network elements to be unbundled by incumbent carriers. Competing providers of advanced services, for example, have emphasized in their comments here that they do not need access to the incumbents' advanced services equipment precisely because they already can obtain and deploy that equipment themselves. In these circumstances, requiring access on an unbundled basis simply cannot be squared with the Act and the Supreme Court's directive.

II. The Commission Should Reject the Attempts by AT&T, MCI WorldCom and Others to Rewrite the Statutory Standard for Unbundling Network Elements.

Having decided that they want any element and any combination of elements anywhere in the country, AT&T and MCI WorldCom set about concocting legal theories to support their wish list. None of these legal theories can withstand scrutiny.

First, MCI WorldCom argues that "[i]f an element does not meet the impairment or necessity standard, it still is properly unbundled" wherever MCI WorldCom wants it. MCI WorldCom Comments at 22. For example, MCI WorldCom argues that "[n]etwork elements should be unbundled to enable CLECs to differentiate their service from that of the ILECs." *Id.* at 25. This argument flies directly in the face of the Supreme Court's decision.

The statutory "necessary" and "impair" standard is not optional. The Supreme Court ruled that "the Act requires the FCC to apply some limiting standard, rationally related to the goals of the Act." *Iowa Utils. Bd.*, 119 S.Ct. at 734. The Commission

therefore has no authority to order incumbent carriers to unbundle network elements where the Commission finds that competitors are not impaired in their ability to provide competitive service without access to those elements.

Moreover, there would have been no reason for the Court to remand the Commission's decision if the Commission could simply disregard the statutory unbundling standard and treat it as optional. It was the Commission's failure to apply the statutory standard that caused the Supreme Court to remand this proceeding in the first place.

Second, AT&T argues that "in these industry conditions, *any increase* in the cost of service or decrease in its quality or scope that results from a LECs' denial of access would defeat the objectives of the Act, even if it were certain that CLECs would nonetheless enter on the same scale and at the same time." AT&T Comments at 9 (emphasis supplied). Again, AT&T is asking the Commission to disregard the Supreme Court's decision.

The Court couldn't have been clearer in rejecting the argument AT&T now makes: "the Commission's assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element 'necessary,' and causes the failure to provide that element to 'impair' the entrant's ability to furnish its desired services is simply not in accord with the ordinary and fair meaning of those terms." *Iowa Utils. Bd.*, 119 S.Ct. at 735. Accepting AT&T's position is flatly contrary to the Court's decision and would serve only to embroil the Commission's unbundling rules in further litigation.

Moreover, any new entrant that builds its own network will incur costs as it invests its own capital in network facilities. And those costs and investments cannot be recovered until the new entrant builds up a customer base. But that is no different than what a new entrant faces in any other industry. As Dr. Crandall explains,

> [I]n any industry, an entrant must commit resources that are fixed with respect to variations in output and are often irretrievably sunk as well. For example, a proprietor of even a new automobile repair garage must invest in wrenches, screwdrivers, oil cans, air compressors, electronic diagnostic devices, lifts, and an inventory of rudimentary repair parts to begin serving the public. Until this proprietor achieves a reasonable customer base, his (her) unit costs will be high compared to those of the "incumbents" – the automobile dealers, gas stations, and independent service stations – in the area. Surprisingly, despite the absence of a regulatory institution that mandates that incumbents lease their unbundled facilities – grease racks, electronic diagnostic devices, and electronic data bases of motor vehicle operating systems – entrants appear on a regular basis to offer repair services in local markets throughout the country.

Crandall Reply Declaration ¶ 12.

In any event, it is the incumbents – not the new entrants – that are at a significant cost disadvantage. New entrants can and do take advantage of more efficient technologies and network configurations as they deploy their networks. The savings that competitors can achieve by these means in one area offset costs in others. And if competitors can get network elements from incumbents at TELRIC rates, they will be paying less for those elements than the incumbent's actual forward-looking costs. As Dr. Crandall explains,

> [T]he large differences between the [Hatfield] model's projection of costs and ILEC actual costs suggest the opposite – that ILECs have a severe cost *handicap* at any given output level over CLECs, who have the luxury of using today's technology to serve today's market.

Crandall Reply Declaration ¶ 16.

Third, AT&T urges the Commission to interpret the statutory unbundling standard so as to make it impossible for incumbent carriers ever to avoid unbundling any of their network elements.[2] According to AT&T, "[a] CLEC's ability to provide service is thus 'impaired' by being denied access to the incumbent LEC's network element if it is unable to provide service as broadly [ubiquitously throughout the nation], as effectively or as promptly as it would if access were granted." AT&T Comments at 29. Under AT&T's approach, incumbent carriers would be forced to provide all network elements forever because there will always be a new entrant that will be able to claim it can't serve some remote corner of the country as effectively or as quickly as it could with access to the incumbents' network elements – even though *competition* is thriving.

The fact of the matter is that it takes time for both incumbent carriers and competitors to deploy their own network facilities. They cannot do it overnight. And there will undoubtedly be some remote areas of the country where competitors will choose not to build their own network facilities. AT&T's approach would therefore place no limit on the incumbents' unbundling obligations and would thus violate the Supreme Court's order.

---

[2] AT&T also goes further and asks the Commission to reinstate its rules on new network element combinations and superior quality interconnection and access. The Commission cannot do so. The Eighth Circuit vacated those rules in *Iowa Utils Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), and that holding remains the law. Neither the Commission nor any other party sought review of the Eighth Circuit's holding in the Supreme Court. And nothing in Supreme Court's ruling calls the Eighth Circuit's decision on those rules into question.

III. The Commission Should Not Require Incumbents to Provide a Platform of Pre-Combined Network Elements for Competitors.

AT&T and MCI argue strenuously that they should be able to obtain any combination of network elements, particularly the UNE Platform, anywhere they want it – even if individual elements do not meet the statutory unbundling standard. The purported rationale advanced by AT&T and MCI WorldCom for requiring incumbents to provide the UNE Platform is to support broad-based, mass market competition for local service. And by mass market, these carriers presumably mean residential customers, particularly those located outside major metropolitan areas. But that rationale certainly does not support a requirement to provide UNE Platform everywhere, particularly for medium and large business customers that can be served by competitors with their own network facilities. And the fact remains that, for all customer segments, imposing an unlimited and indefinite UNE Platform requirement will harm, rather than promote, the development of facilities-based competition.

If a network element does not meet the statutory standard for unbundling, the Commission cannot require incumbents to unbundle that element either individually or in combination with other network elements. As the Supreme Court explained, the whole question of the so-called "UNE platform" is likely to become "academic" once the Commission properly applies section 251(d)(2). *Iowa Utils. Bd.*, 119 S.Ct. at 736; *id.* at 737. Each and every element of the UNE Platform must independently satisfy section 251(d)(2), and "[i]f the FCC on remand makes fewer network elements unconditionally available through the unbundling requirement, an entrant will no longer be able to lease every component of the network." *Id.*

Moreover, making the UNE Platform available ubiquitously destroys the incentive for competitors to invest in their own facilities and produce the most vigorous and long-lasting form of competition. As Dr. Crandall explained, "if the Commission requires the provision of an entire UNE platform at TELRIC rates, CLECs may avoid investments in entire new technologies for delivering local service and simply pursue the less innovative and lower-risk strategy of simply leasing the entire UNE platform." Crandall Declaration at ¶ 20.

AT&T claims that the UNE Platform is needed to overcome an "inherent cost differential" between incumbent carriers and their competitors. According to AT&T, "CLECs, unlike incumbent LECs, must incur substantial costs first to disconnect their new customers' loops from the incumbent LEC switch and then to extend those loops to the CLEC's switch using interoffice transport facilities." AT&T Comments at 86. If this cost differential really existed, as AT&T claims, then competitors would not be deploying their own local switches. But the fact of the matter is that competitors have deployed hundreds of their own switches and those switches are handling billions of minutes of traffic. These carriers are obviously not impaired in their ability to provide competing service, particularly to business customer, by using unbundled loops – or their own loops – with their own switches, rather than leasing the UNE Platform.

On the other hand, if AT&T could obtain the UNE Platform in areas where its competitors had already deployed their own switches, AT&T would have an artificial and unwarranted advantage over those competitors. AT&T would be able to serve customers without incurring the risk of investing its own capital in a switch and without incurring the cost of moving unbundled loops from the incumbents switch – risks and costs that

AT&T's competitors are already incurring in those areas. There is no reason to give AT&T such an artificial competitive advantage over its competitors. AT&T should be required to compete on a level playing field with carriers that have already deployed their own network facilities.

IV. The Commission Should Adopt Rules That, At a Minimum, Do Not Require Incumbents To Unbundle Network Elements in Areas Where Competitors Have Already Deployed Their Own Elements Or Can Obtain Them From Alternative Sources.

AT&T and MCI WorldCom are vociferous proponents of the Commission adopting national unbundling rules. But in their view, the concept of national unbundling rules means that every element is available in every area of the country for any carrier to use to provide service to any customer. Under their concept, no incumbent carrier would be relieved of any unbundling obligation until competitive alternatives for a particular network became available in the very last geographic area of the country, for every customer segment and for every carrier. Such an extreme view is neither required by the concept of "national rules" nor consistent with the Supreme Court's decision.

The Commission can adopt national rules that define a set of network elements and require individual network elements to be unbundled only in those areas or situations where competitive alternatives are not available. The Commission's rules can incorporate objective and readily-verifiable criteria for determining where competitive alternatives are available, which were described in Bell Atlantic Comments and are briefly summarized below. The Commission's rules do not need to rely on further litigation before the Commission or state regulatory bodies.

Moreover, there is already extensive evidence on the record proving that any requirement to unbundle network elements that are already available from alternative sources will severely damage competition. As Professor Kahn explained, "[m]uch more important, from the standpoint of the public interest, is to avoid the anti-competitive consequences of a looser definition [of what should be unbundled], which would discourage new, risky investment--not only by the incumbents but also, by *existing* facilities-based CLECs, which have already invested billions of dollars of their own capital in challenging the historical monopolists and are investing billions more each year, and by new would-be entrants, by offering them the opportunity instead to free ride on the facilities of others." Kahn Declaration at ¶ 11. Dr. Crandall also testified that "[e]xtensive unbundling of existing circuit-switched networks is likely to dissuade entrants from adopting these new technologies and to discourage incumbent local-exchange companies (ILECs) from engaging in similar innovation in their own networks." Crandall Declaration at ¶ 3.

The competitive damage that can be done through excessive unbundling was also documented by competitors. Cox Communications, for example, explained that "[a] regulatory regime that fosters the broad availability of incrementally priced UNEs discourages competing carriers from building their own networks and leaves them dependent over the long term on the ILECs, to the detriment of the public interest." Cox Comments at 3. Accordingly, the Commission can and should adopt national rules that do not require unbundling of local transport in areas where competitive alternatives are now available.

A. The Commission Should Not Require Incumbents to Unbundle Local Switching In Rate Exchange Areas Where Competitors Already Have Telephone Numbers for Their Own Switches.

The evidence of competitors deploying their own local switches is both overwhelming and undeniable. Competitors have deployed over 700 switches throughout the country and those switches are handling billions of minutes of traffic each month. These competitors' switches are serving customers in more than one third of the exchange areas in the country – *and nearly two thirds of the exchange areas in the Bell Atlantic region*. *See* Exhibit 1 (national map of CLEC switches).

The new entrants that have invested in these switches see no reason for incumbent carriers to unbundle their local switching capabilities. MGC Communications, for example, explained that the requirement to unbundle local switching "may be extinguished with no adverse effects on the development of competition." MGC Comments at 30. MGC Communications has had no problem obtaining the local switching capacity it needs to provide competitive telecommunications services:

> MGC currently provides switched voice and data services through the deployment of Nortel DMS 500 switches. MGC does not need to acquire switching capability from the ILEC. The switches MGC has deployed are generally available to all CLECs to purchase from Nortel, Lucent, or any other third party switch vendor. Therefore, competitors are not dependent on the ILEC for switching.

MGC Comments at 31. Rhythms NetConnections Inc. said "it appears that because a new entrant can in many circumstances buy and use electronic switching systems on comparable terms and conditions from several different commercial vendors, a competitor's ability to provide service would, in general, not be materially diminished by an inability to gain access to an ILEC's switch." Rhythms Comments at 27-28.

Likewise, a wide variety of facilities-based entrants and their representatives – ALTS, Allegiance, e.spire, Intermedia, Level 3 Communications, Inc., NextLink Communications, Inc., MediaOne Group, Inc., Cox Communications, Inc., and COVAD – made no request for the Commission to require unbundling of local switching. These carriers have already invested heavily in their own switching capacity and demonstrated that they are not impaired in their ability to provide competitive telecommunications service without the incumbents' unbundled local switching.

The record in this case already supports eliminating entirely any unbundling requirement for local switching. Competitors can expand the reach of their existing switches or deploy additional ones to serve virtually any customer in the country. But as Bell Atlantic pointed out in its opening comments, at a minimum, the Commission should take a balanced approach and eliminate an unbundling requirement for local switching in those areas where competitors are now using their switches to provide local services, or will do so shortly. These areas can readily be determined from the blocks of telephone numbers that have been assigned to competing carriers and published in the industry Local Exchange Routing Guide. *See* Bell Atlantic Comments at 23.

This middle ground is the same one advanced by the new entrant Focal Communications. As Focal explained, "it would contradict the Act's goal of furthering facilities-based competition to make ILEC unbundled switching compete with CLEC switching in the same area. . . . By limiting unbundled switching to areas where CLEC self-provisioning does not exist, the Commission would be honoring Congress' goal to foster facilities-based competition." Focal Comments at 5. Focal then explained how these areas can be identified through the Local Exchange Routing Guide.

> The best direct measure of whether CLEC switching is operationally available within a given area is the existence of a CLECs' NXX in the national LERG data base. Because every NXX has a geographic area associated with it (the "V&H"), the LERG provides a simple and objective test of the presence of CLEC switching in any area. Any ILEC receiving a request for unbundled switching should be allowed by the Commission's rules to exclude such an area from its obligation to provide unbundled switching.

Focal Comments at 5-6.

Quite predictably, AT&T and MCI WorldCom want the Commission to ignore all of this evidence and order incumbent carriers to unbundle local switching everywhere. None of their arguments are credible.

AT&T wants access to unbundled switching because "the requisite capital investment required for a broad, switch-based market strategy is huge." AT&T Comments at 88. It is rather ironic that a company with pockets as deep as AT&T's would make this argument since it already has switches throughout the country that it is using for local services, such as Digital Link service, switches throughout the country that it is using for wireless services, and has cable television lines giving it access to more than 50 percent of residential customers across the country. In any event, even small new entrants have not found capital requirements to be an impediment to deploying switches.

> [T]here do not appear to be significant obstacles to CLECs raising the capital to purchase switches with the proper business plan and experience. Focal was a start-up company with almost no business three years ago, yet Focal has been able to raise almost two hundred million dollars from the venture capital and high-yield markets, and now provides metropolitan Chicago, New York, Boston, Washington, Los Angeles, San Francisco, and Philadelphia with services from seven operating switches, with additional facilities planned for the near future.

Focal Comments at 5.

MCI WorldCom complains that CLECs with their own switches are disadvantaged because in order to use their own switches, "CLECs must get their

customer traffic off the loops that terminate at the ILEC end offices and transport it to their switches." MCI WorldCom Comments at 51. AT&T makes a similar complaint. AT&T Comments at 86. This is merely a part of building a competitive network. It does not show that competitors are impaired in their ability to provide service. Indeed, competitors have overcome any such operational issues. In the Bell Atlantic region, they have established collocation sites to connect their facilities to Bell Atlantic's, have obtained access to more than 100,000 loops and have deployed nearly a million of their own loops to business customers. They are now handling billions of minutes of traffic each month with their own switches. And the fact that they are doing it unequivocally shows that it can be done.

B. The Commission Should Not Require Incumbents to Unbundle Local Transport Facilities In Wire Centers Where Competitors Have Already Collocated Their Own Facilities.

The evidence of the deployment of alternative transport facilities is quite extensive. In the Bell Atlantic region alone, competing carriers have over 725,000 miles of fiber. These carriers have connected their networks to about 550 Bell Atlantic central offices through over 1,667 collocation arrangements. These competing networks now have access to approximately *90 percent* of the Bell Atlantic's transport customers. In fact, by the beginning of 1998, competitors were using their own networks to provide approximately 30 percent of the high capacity transport services in the Bell Atlantic region and up to 50 percent in key business centers.

New entrants and alternative transport providers have also documented the widespread deployment of transport facilities in this country. For example, Metromedia

Fiber Network Services, Inc. "presently operates high-bandwidth intra-city fiber optic communications networks in the New York City metropolitan area, the greater Philadelphia area, and in the Dallas Metroplex area." Metromedia Comments at 1. In total, "MFN's planned domestic intra-city networks will ultimately encompass approximately 810,000 fiber miles, covering approximately 1,896 route miles." *Id.* at 1-2.

Competing carriers are not the only ones deploying facilities to provide alternative transport services. UTC, the national representative on communications matters for the nation's electric, gas, and water utilities and natural gas pipelines, reports that "as of 1997, utilities had installed 40,000 route miles of fiber optic cable representing over 750,000 fiber miles, and they indicated an intent to install another 36,000 route miles within the next three years." UTC Comments at 3.

Even the staunchest unbundling advocates are forced to admit the availability of alternatives for transport services. AT&T says that *nearly 20 percent of its transport services are obtained from companies other than incumbent carriers*. AT&T Comments at 122 (emphasis supplied). MCI WorldCom also admits that competitive alternatives already exist for the transport services it uses: "*we can self-provision transport to just over 400 ILEC end offices [and] can purchase transport from other CLECs and CAPs to reach approximately 1,200 additional ILEC end offices.*" MCI WorldCom Comments at 64 (emphasis supplied). In fact, MCI WorldCom concedes that "[t]here are, then, a few locations in which MCI WorldCom and other CLECs would not be impaired if they were denied access to ILEC transport as an unbundled network element." *Id.* at 65.

Given the existence of alternative sources for transport services, it is no surprise that facilities-based carriers, such as MediaOne Group, Inc., Focal Communications Corp. and Cox Communications, have not asked to Commission to require unbundling of local transport facilities. These carriers have built their own networks and offer their own competitive telecommunications services without using unbundled transport elements. Moreover, wireless carriers have obtained the transport services they needed to build their network, such as to connect their switches to their cell site antennas, and are now using those networks to provide telecommunications services on a competitive basis. As Dr. Crandall explained,

> [T]here is ample evidence from the commercial mobile wireless services (CMRS) market that unbundled ILEC local transport is not a source of impairment for the development of local telecommunications facilities. Since the completion of the PCS auctions, CMRS providers have moved aggressively to complete their networks and, in many cases, to develop large, national footprints.

Crandall Declaration at ¶ 33.

In light of the evidence of competitive alternatives for local transport, Bell Atlantic again suggests that the Commission take a balanced approach. The Commission's rules should not require incumbent carriers to unbundle local transport in those areas where competitive alternatives are already available.[3] And as Bell Atlantic explained in its initial comments, those areas are the large wire centers with at least one collocating carrier. *See* Bell Atlantic Comments at 39.

---

[3] Since these transport facilities are also used as high capacity loops to serve business customers, such as DS1 and DS3, Bell Atlantic recommends that the incumbent carriers not be required to unbundle high capacity loops in the those areas where competitive alternatives are already available.

Despite the undeniable presence of competitive alternatives, AT&T and MCI WorldCom argue that incumbent carriers should be required to unbundle local transport everywhere. Their arguments do not withstand scrutiny.

First, AT&T argues that "[f]or third-party dedicated transport to serve as a true substitute for unbundled dedicated transport, third parties would have to provide dedicated transport along all the existing routes between end offices, tandem switches, CLEC points-of-presence, and customer premise switches on which CLECs may need to rely." AT&T Comments at 122. This argument is nothing more than a restatement of AT&T's view that an unbundling obligation cannot be lifted until competitive alternatives exist in every single geographic area of the country. That view is flatly inconsistent with the statutory standard for unbundling only where such is "necessary" or where competitors would be "impaired" without access to the unbundled network element.

Moreover, AT&T's argument is based on entirely false premises. First, AT&T assumes that incumbent carriers, such as Bell Atlantic, have transport facilities running directly between every pair of central offices. In fact, for many pairs of central offices, Bell Atlantic's transport facilities run through one or more intermediate central offices. Second, AT&T assumes that alternative providers must exactly replicate the transport networks of the incumbents in order to compete. Again, this assumption is incorrect. A carrier can offer competing transport services between two points by using a route that is entirely different from the route used by the incumbent. As Dr. Jackson explained, "[w]hen CLEC fiber or microwave connects to an ILEC central office, then interoffice

transmission services to all other ILEC central office locations also connected to CLEC fiber or microwave have competitive alternatives." Jackson Declaration at ¶18.

Second, MCI WorldCom argues that "as to transport . . . there is little need for regulation that protects against unnecessary leasing, and there is no harm in a regulation that is marginally overinclusive." MCI WorldCom Comments at 65. MCI WorldCom's argument is nothing more than an invitation to ignore the statutory unbundling standard and the Supreme Court's order. Imposing an unbundling obligation in areas where competitive alternatives already exist would give no meaning or limit to the statutory "necessary" and "impair" standards. And as explained above (at pp. __), any requirement to unbundle network elements that are already available from alternative sources will severely damage competition.

C. The Commission Should Not Require Unbundling of Directory Assistance and Operator Services Anywhere In The Country.

The comments here confirm that neither operator services nor directory assistance satisfy the standards in the Act and the Supreme Court's decision.

Comments from competing carriers, state regulatory commissions and other carriers who obtain operator services and directory assistance from third parties all confirm that these items are widely and readily available from alternative sources. For example, MGC Communications states that "MGC and other CLECs may purchase Operator Services and Directory Assistance Services from a number of vendors offering cost effective national-in-scope alternatives to the ILECs product offering." MGC Communications Comments at 31. Sprint also concedes that operator services and directory assistance are a "possible exception" to the "necessary" and "impair" criteria.

Sprint Comments at 30. State commissions corroborate the availability of operator service and directory assistance alternatives in their jurisdictions. For example, the Public Utilities Commission of Ohio (PUCO) appropriately recommends that operator services and directory assistance be removed from the Section 319 list because "OS/DA is widely available from non-ILEC carriers such as alternative operator service providers, IXCs and various CLECs. It is also the case that a majority of CLECs self-provision OS/DA." PUCO Comments at 12.

Operator services and directory assistance are as integral to long distance services as they are to local services and, as a result, long distance companies and their operator services and directory assistance suppliers have developed substantial proficiency and expertise in the provisioning of both retail and wholesale operator services and directory assistance in competition with incumbent carriers. In the retail market, long distance companies accounted for over 68% of the operator services market in 1998, and represented 72% of the wholesale operator services market by 1997. *Report on RBOC Wholesale Strategies*, prepared by Frost and Sullivan, 1998, at Figures 3-4, 8-10 ("Frost and Sullivan Report").

Nonetheless, a few parties – most notably AT&T and MCI who already provide their own competing services – argue that operator services and directory assistance should be subject to mandatory unbundling. Their arguments, however, do not hold water.

First, they say that incumbents should be forced to unbundle because their operator services and directory assistance are better than those provided by AT&T, MCI WorldCom and other alternative vendors. But incumbents have no monopoly on training

and recruitment of proficient operators. CLECs can hire and train personnel, including those with language skills from the geographic areas they choose to serve, just as incumbent carriers and competitive providers do. CLECs can also train operators to assist and be responsive to customers, or to search quickly for listings despite misspellings or limited information provided by the caller.[4]

Second, AT&T and MCI WorldCom argue that operator services and directory assistance should be unbundled because of their complaints about the rerouting of their customers' calls to their operator services and directory assistance center. While their claims have absolutely no merit, it is strikingly apparent that the issue of rerouting operator services and directory assistance calls from a CLEC's customers to its operator services and directory assistance center has nothing to do with the issue of whether a CLEC requires access to an incumbent carrier's operator services or directory assistance in order to provide a competitive local exchange service.

V. The Commission Should Not Create New Unbundling Requirements.

A. The Commission Should Not Require Unbundling of Advanced Services Equipment.

If there is an incumbent for advanced services providing high speed access to the Internet, it is cable television companies that already have the lead in this market. In fact,

---

[4] AT&T and MCI WorldCom claim that alternative sources for directory listings are less reliable because they are not updated as frequently as ILEC-provided directory listings. But timely access to the ILECs' directory listings is already available to CLECs and commercial directory assistance database providers, so that this purportedly superior resource is equally available to CLECs without reliance on an ILEC's directory assistance services as an unbundled element.

80 percent of the total number of users of high-speed Internet services are using cable modems. UNE Fact Report at VI-8.

Incumbent carriers are now deploying advance services equipment in a competitive market with absolutely no assurance that those investments will be successful or profitable. New entrants are likewise deploying their own advanced services (xDSL) equipment in incumbents' central offices and hooking that equipment up to loops in order to provide high speed Internet access. Both incumbents and new entrants are competing against other technologies, such as cable modems, terrestrial wireless and satellite technologies. New entrants are plainly not impaired in their ability to provide advanced services without access to the incumbents' advanced services equipment on an unbundled basis.

Rhythms NetCommunications, Inc. quite candidly admitted that advanced services equipment, particularly Digital Subscriber Line Access Multiplexers ("DSLAMs"), do not need to be unbundled.

> Because Rhythms has been purchasing DSLAMs in the wholesale market for over a year and has found these facilities to be commercially available on competitive terms and conditions, Rhythms does not believe that, as a general matter, an inability to gain unbundled access to DSLAMs would materially diminish a CLEC's ability to offer advanced services.

Rhythms Comments at 25. NorthPoint Communications, Inc. echoed this position.

> To date, all of the competitive LECs [] have entered the advanced services market by installing their own DSLAMs in central office collocation cages purchased from the incumbent LECs. Where competitive LECs enjoy access to loops and collocation, any competitive LEC can provide the necessary infrastructure (DSLAMs and packet switches) required to provide advanced services.

NorthPoint Comments at 18. There simply is no reason to unbundle advanced services equipment.

Once again, other facilities-based entrants and their representatives – such as ALTS, Allegiance, e.spire, Intermedia, NextLink Communications, Inc., MediaOne Group, Inc., Cox Communications, Inc., COVAD, and MGC Communications, Inc. – did not even request unbundling of advanced services equipment. In addition, the Information Technology Industry Council opposes an unbundling obligation for advanced services equipment.

> ILECs have no legacy advantage with respect to the installation and use of advanced services electronics such as Digital Subscriber Line Access Multiplexers ("DSLAMs"). . . .
>
> Moreover, the ILECs' competitors can acquire and install equipment for advanced services on a relatively equal footing with the ILECs. The relevant electronic equipment is produced by numerous vendors, establishing a competitive equipment market that can effectively discipline prices, provisioning, and other service terms for the foreseeable future. As a general matter, the collocation of DSLAMs in an ILEC central offices is not an expensive, capital intensive exercise. And competitive entrants in the advanced services market typically have substantial market capitalization and the requisite financial resources to purchase and install the required electronics. Thus, the equipment is readily and practically available to ILECs and competitors alike.

ITIC Comments at 6-7.

Given the fact that competitors are now offering advanced services using their own equipment, they are plainly not impaired in their ability to offer competitive services without access to incumbent carriers' advanced services equipment on an unbundled basis. There is no reason for the Commission to require unbundling of advanced services equipment anywhere in the country. In fact, if the Commission were to require unbundling of advanced services equipment, the new entrants' investment in new technology would be undermined because their competitors could simply lease new technology from incumbents at TELRIC prices, rather than risking their own capital on

such investments. *See* Jorde, Sidak, and Teece Declaration at ¶52 (attached to USTA Comments).

Moreover, if incumbents were required to unbundle their advanced services equipment as they deploy it, there would be little incentive for competitors to invest in their own advanced services equipment. This disincentive will severely damage innovation in telecommunications services. See Kahn Declaration at 17.

Notwithstanding the fact that virtually every competitor in the market is using its own equipment to provide advanced services, AT&T and MCI WorldCom nonetheless argue that the Commission should require incumbents to unbundle their advanced services equipment. MCI WorldCom complains that "[i]n many circumstances it is not possible or economically viable for a CLEC to install its own DSLAM because no collocation space is available at the ILEC end office or remote terminal, or because the revenues that would be generated are insufficient to justify the costs of collocation, as well as the costs of purchasing and installing the DSLAM." MCI WorldCom Comments at 50. This argument is both disingenuous and wrong.

First, MCI WorldCom is telling a very different story to members of Congress. According to MCI WorldCom's briefing paper, "[l]ast October, MCI WorldCom's UUNET affiliate announced the industry's most aggressive nationwide rollout of DSL services." Exhibit 2. Apparently, MCI WorldCom's lobbyists do not believe there are any obstacles to the deployment of advanced services equipment.

Second, there have been few, if any, instances where carriers have not been able to obtain some form of collocation arrangements from Bell Atlantic for placement of their advanced services equipment. Local competitors are also occupying more than 1,667

physical and virtual collocation nodes in Bell Atlantic's central offices, giving them access to most of the access lines served by Bell Atlantic.

Third, requiring unbundling of advanced services equipment is exactly the type of access that AT&T has argued so vehemently that it should not be required to give over its cable television lines. "No company will invest billions of dollars to become a facilities-based broadband services provider if competitors who have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride on the investments and risks of others." C. Michael Armstrong, *Telecom and Cable TV: Shared Prospects for the Communications Future*, speech delivered to Washington Metropolitan Cable Club, Washington, D.C. (Nov. 2, 1998). Even AT&T's economists argued against unbundling of broadband lines: "[f]orced unbundling with its attendant regulatory uncertainty would likely slow down the investment in the development of broadband last mile data transport." Declaration of Professors Janusz A. Ordover and Robert W. Willig at ¶ 49, attached to AT&T's and TCI's Joint Reply to Comments and Joint Opposition to Petitions to Deny or To Impose Conditions, *Joint Application of AT&T Corp. and Telecommunications, Inc. for Transfer of Control to AT&T of Licenses and Authorizations Held by TCI and its Affiliates or Subsidiaries*, CS Docket No. 98-178 (Nov. 13, 1998).

B. The Commission Should Not Require Line Sharing or Spectrum Unbundling.

A few parties ask the Commission to require line sharing or spectrum unbundling in this proceeding. *See, e.g.*, Network Access Solutions, Inc.'s Comments at 20. The Commission should not do so.

First, there are important policy reasons why the Commission should not require line sharing or spectrum unbundling. As Dr. Crandall explains, "[i]f ILECs are required to share their lines with entrants at TELRIC rates, these entrant will have far less incentive to deploy alternative technologies – such as those using terrestrial wireless or satellite circuits – thereby reducing the degree of competition in the advanced-services marketplace." Crandall Reply Declaration ¶ 27.

Second, some of the proponents of line sharing argue that they are caught in a "price squeeze" when they try to offer only data services over a loop and do not offer any voice services over that same loop. *See, e.g.,* NorthPoint Comments at 15. But the Commission has already considered and rejected that argument.

> [I]t is not clear that fear of a price squeeze is well-founded. Northpoint's argument is premised on its assertion that GTE's rate for its ADSL service 'is less than the price it charges competitive LECs for the loops, collocation and transport necessary to provide DSL service,' but this is not an apt comparison. When a requesting carrier purchases these unbundled network elements, the facilities in question are capable of supporting a variety of services in addition to ADSL, such as local exchange service and access services. *Competitors need not recover their costs from ADSL service alone; they have the same opportunity as GTE to recover the costs of network elements from all of the services they offer using those facilities.* Thus, a carrier choosing to offer only data service over a facility that is capable of carrying more, such as GTE's ADSL offering, may not reap the entire revenue stream that the facility has to offer.

In the Matter of GTE Telephone Operating Cos. GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-7 at ¶ 31 (rel. October 30, 1998)(emphasis supplied). And as Professor Kahn explains, the Commission's reasoning is entirely sound from an economic perspective.

> CLECs offer the ... contention that the ILEC does not necessarily impute to itself or to its own xDSL operations and offerings any part of the cost of the loop, presumably because its marginal cost for this new usage is something close to zero; and a similar availability of the loop to them at similarly low-to-zero

> marginal cost would therefore do no more than put them on an even competitive footing. The response is that in competitive market sellers do not price on the basis of "imputed" common costs, when these costs must be recovered either in the form of fixed customer charges or on the basis of what the respective services produced with the aid of the inputs will bear. Competitive parity would therefore require that both sets of rivals bear the same loop costs, each recovering them in either of those two ways – not that one set of rivals be totally exempted from them, as the proponents of what is deceptively labeled "line sharing" would have it.

Kahn Reply Declaration at 15-16.

Third, the Commission has already solicited comments on this issue in a separate proceeding, and those comments are due later this month. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Further Notice of Proposed Rulemaking (rel. March 31, 1999). No purpose would be served by addressing the same issue in two separate rulemaking proceedings.

C. The Commission Should Not Require Unbundling of Loop and Transport Combinations or Permit Conversions of Special Access Services to Unbundled Network Elements.

Some carriers ask the Commission to require incumbent carriers to provide loops and transport elements in preassembled combinations on a ubiquitous basis. *See, e.g.*, Joint Comments of e.spire and Intermedia at 28. They really just want to substitute these network element combinations for already competitive high capacity special access services. This request should be rejected for the same reasons the Commission should reject requests for the UNE Platform.

Where the statutory standard for unbundling an element is not met, the Commission cannot require incumbents to provide that element either individually or in combination with other elements. As Bell Atlantic has already shown (Bell Atlantic

Comments at 26-32; *supra* at 11-14), competitive alternatives for transport and high capacity loops already exist in many areas for medium and large business customers. At a minimum, these elements do not satisfy the statutory standard for unbundling in these areas.

Requiring incumbents to provide combinations of transport and high capacity loops where competitive alternatives already exist will discourage investment in those network facilities. As Dr. Crandall explains, "[i]t is also important that the Commission not require the combination of certain elements, such as local loops and transport, because such a requirement will surely reduce incentives for competitors to deploy the elements separately." Crandall Reply Declaration ¶ 26.

E.spire and Intermedia also make a related argument to the Commission. They ask for "rules requiring ILECs to convert special access circuits to equivalent UNEs (or UNE combinations) after approval of an interconnection agreement between the CLEC and ILEC." E.spire/Intermedia Comments at 34. There is no basis for the Commission to do so.

Competing carriers have offered transport services on a competitive basis for at least 14 years and now have access to approximately *90 percent* of the Bell Atlantic's transport customers. Since this competitive market developed well before the Telecommunications Act, these carriers provided their transport services without using any of the incumbent's unbundled network elements. The Commission's *Expanded Interconnection* regime gave competitors what they needed to compete in this market and provided the appropriate incentives for competitors to build their own competing transmission facilities and to deploy their own transmission equipment in collocation

arrangements. In fact, the Commission's *Expanded Interconnection* regime made collocation available to "all parties who wish to *terminate their own special access transmission facilities* at LEC central offices." *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, ¶65 (1992) (emphasis supplied). Competing carriers did not then and do not now need access to the incumbent carriers' interoffice transport facilities or high capacity loops on an unbundled basis to provide special access services.

In fact, not only do *90 percent* of Bell Atlantic's special access customers have competitive alternatives available, but they are also making extensive use of those alternatives. By the beginning of 1998, competitors were using their own networks to provide approximately 30 percent of the high capacity special access services in the Bell Atlantic region and up to 50 percent in key business centers. And these figures have no doubt increased in the last year. The Commission should therefore not allow competing carriers to displace existing special access circuits with unbundled network elements or combinations of elements.

D. The Commission Should Not Require Dark Fiber Unbundling.

AT&T, MCI WorldCom and several other carriers ask the Commission to require incumbent carriers to unbundle fiber strands that are not used to provide telecommunications services ("dark fiber"). The Commission decided not to require dark fiber unbundling when it first promulgated its network element rules and these carriers do not show how the facts have changed in the last three years to justify reversal of the Commission's prior decision.

As a preliminary matter, dark fiber does not even qualify as a "network element" under the Act. A network element "means a facility or equipment used in the provision of a telecommunications service." 47 U.S.C. § 153(29). A "telecommunications service," in turn, is defined in the Act as the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). The term "telecommunications" is further defined in the Act as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the formal content of the information as sent and received." 47 U.S.C. § 153(43).

The United States Court of Appeals for the Eighth Circuit in *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 808 (8th Cir. 1997), emphasized that to qualify as a network element, equipment must be used in the overall commercial offering of telecommunications, i.e., in the provision of service for a fee to the public. As the Court explained: "We believe that the FCC's determination that the term 'network element' includes all the facilities and equipment that are used in the overall commercial offering of telecommunications is a reasonable conclusion and entitled to deference." 120 F.3d 808-09.

The FCC also has addressed the statutory definition of "telecommunications service" in the context of its review of SBC Communications, Inc.'s application to provide interLATA services. The FCC, like the Eighth Circuit, explained that the provision of telecommunications service requires that there be a payment of a fee for the rendered service or offering. The FCC observed that:

> The statutory definition of "telecommunications service" requires the offering of service "for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the

> facilities used."...The Commission has previously stated that the phrase "for a fee" in Section 153(46) of the Act "means services rendered in exchange for something of value or a monetary payment."

Application of SBC Communications to Provide In-Region InterLATA Services in Oklahoma, 12 FCC Rcd 8685 at ¶ 17, fn 64 (1997).

Dark fiber does not qualify as a network element because it is not used to provide telecommunications service. Without any electronics connected to dark fiber, no information is or can be transmitted over dark fiber. Nor is dark fiber used in the commercial offering of telecommunications, i.e., for a fee directly to the public.

State regulatory commissions in New York, New Jersey, Pennsylvania, Maryland, Virginia and the District of Columbia have rejected claims that dark fiber constitutes a network element under the Telecommunications Act. Exhibit 3. In essence, the commissions generally concluded that dark fiber is not "used in the provision of a telecommunications service" (and thus does not rise to the level of a network element as defined in the Act); that failure to provide access would not impair the ability of the requesting carrier, compared with the carrier's use of other unbundled elements; and that operational difficulties could reasonably arise. In New York, for example, arguably the most intensely competitive telecommunications market in the world, the Commission found that "dark fiber is not an element" and that BA-NY is "not in the business of providing facilities" as opposed to services and service networks "to competitors. Such a requirement could interfere unreasonably with New York Telephone's investment and construction plans." *Petition of AT&T Communications of New York for Arbitration of an Interconnection Agreement with New York Telephone Company*, Case No. 96-C-0723, Opinion No. 96-31 at 69 (NY PSC Nov. 29, 1996).

In addition to the six decisions cited above, state regulatory commissions in other pro-competitive states have similarly concluded that dark fiber need not be made available under the Act. California, Florida, Indiana, Louisiana, North Carolina and Mississippi have all so held. *Application of MCI Telecommunications Corp. for Arbitration with GTE California, Inc.*, No. 96-09-012, at 34 (Cal. PUC Sept. 10, 1996) ("Since dark fiber is not used to provide telecommunications services, . . . GTEC shall not be required to unbundle its dark fiber."). *Petition for Approval of Transfer*, 96 FPSC 12:507 at 525-26 (1996); *Petition of AT&T Communications of Indiana*, 1996 Ind. PUC LEXIS 427 at 40-41 (1996); *AT&T Communications of South Central States, Inc.*, 1997 WL 19108 at 24-25 (La P.S.C. 1997); *MCI Telecommunications Corp.*, 1997 WL 233032 at 9-10 (N.C.U.C. 1997).

Furthermore, the United States District Court for the Eastern District of Virginia (Richmond Division) recently ruled, as a matter of law, that Bell Atlantic is not required to make dark fiber available to requesting carriers because it does not constitute a network element within the meaning of the Telecommunications Act. *MCI v. Bell Atlantic-Virginia*, Civil Action No. 3:97CV629 (E.D.Va. July 1, 1998).

Even if dark fiber were a network element under the Act, it does not meet the statutory standard for unbundling. That is because of the availability of alternative transport services and facilities.

First, as explained above, competing carriers have already deployed hundreds of thousands of miles of fiber optics. In the areas where fiber has been deployed, competitors are not impaired in providing competitive telecommunications services by not having access to the incumbents' dark fiber.

Second, alternative providers will provide dark fiber to carriers on a wholesale basis. For example, Metromedia Fiber Network Services, Inc.'s "business is focused on providing extremely high-bandwidth, fiber optic communications infrastructure, including 'dark' fiber, and related services to communications carriers and corporate/government customers." Metromedia Comments at 1. In addition, electric, gas and water utilities are offering dark fiber along their existing networks, rights of way, poles and conduit.

> As recently 1997, UTC's members reported that they had deployed an average of 359.3 route miles of fiber cable. . . . Overall, as of 1997, utilities had installed 40,000 route miles of fiber optic cable representing over 750,000 fiber miles, and they indicated an intent to install another 36,000 route miles within the next three years. In addition to utilities, non-incumbent local exchange carriers reported in 1997 that they had deployed 1,861,413 miles of dark fiber. These statistics demonstrate the existence of widespread deployment of alternative sources of inexpensive dark fiber.

UTC Comments at 3. It is for these reasons that these alternative providers oppose any dark fiber unbundling requirement.

> It is unnecessary to unbundle dark fiber, because it is widely available from alternate sources. Nor will it impair the ability to provide local exchange service if requesting carriers do not have access to dark fiber from an incumbent carrier, because dark fiber is a thinly-margined service that is already available to competing carriers at or near cost.

UTC Comments at 1.

Third, any carrier can deploy its own fiber by using Bell Atlantic's poles, ducts, conduit and rights of way. In fact, competing carriers can hire a contractor to install the fiber on the poles or pull it through the ducts.

VI. Conclusion.

AT&T and MCI WorldCom would like the Commission to ignore the fact that competing carriers have widely deployed their own local network facilities and are using them to provide local telephone service on a competitive basis. They want the Commission to adopt unbundling rules that would give them access to every imaginable network element, anywhere, anytime, and in any combination.

The Commission should reject the extreme position propounded by AT&T and MCI WorldCom and take a balanced approach to promote efficient and dynamic competition, rather than fostering or protecting individual competitors. This approach will encourage investment in competing facilities by new entrants and incumbents alike. While competing carriers are entitled under the Act to obtain access to network elements that they truly need to get into the local market and compete, they do not need access to individual elements where competitors already have deployed their own or where the elements are available from alternative sources.

Respectfully submitted,

By: _____

James G. Pachulski
1320 North Court House Road
Eighth Floor
Arlington, VA 22201
(703) 974-2804

Attorney for the Bell Atlantic
Telephone Companies

Of Counsel

Michael E. Glover

Dated: June 10, 1999

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	

UNE FACT REPORT

Submitted by the United States Telephone Association

Prepared for Ameritech, Bell Atlantic, BellSouth, GTE, SBC, and U S WEST

Peter W. Huber
Evan T. Leo

May 26, 1999

Attachment to USTA's Comments (5/26/99) in CC Dkt. 96-98, FNPRM

FOREWORD

This report was prepared on behalf of the Bell Operating Companies (Ameritech, Bell Atlantic, BellSouth, SBC, and U S WEST), and GTE. These companies supplied us with internal data, and helped us to understand its competitive significance. We also drew extensively from public sources, including the trade press, industry reports, company disclosures to the investment community, and maps and databases compiled by independent analysts. All proprietary information regarding competitors' use of ILEC network elements, capabilities, and services was kept strictly confidential, and is presented only in aggregate form.

Peter Huber
Evan Leo